FILED
NOV 27 1956
JOHN T. FEY, Cle

IN THE

Supreme Court of the United States

October Term 1956

No. 597

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL No. 560, a labor organization; ROBERT LENAGHEN, LORA DENKERS, MEL SIMPSON, *Appellants*

v.

J. J. NEWBERRY COMPANY, a corporation, *Appellee*

On Appeal From the Supreme Court of the State of Idaho

JURISDICTIONAL STATEMENT

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v.

J. J. NEWBERRY COMPANY, a corporation, *Appellee*

On Appeal From the Supreme Court of the State of Idaho

JURISDICTIONAL STATEMENT

Appellants appeal from the order of the Supreme Court of Idaho entered on July 2, 1956, denying appellants' petition for rehearing (R. 11-16), and from the judgment of the Supreme Court of Idaho entered on June 6, 1956 (R. 12), affirming the decree of the District Court of the Fifth Judicial District of the State of Idaho (R. 477), which permanently enjoined appellants from picketing appellee's place of business. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Idaho affirming the decree of the District Court, — P. 2d —, 38 LRRM 2258 is reported at — Idaho —. A copy of this opinion is attached hereto as Appendix A. The Supreme Court of Idaho did not render an opinion in denying appellants' petition for rehearing. The opinion of the Idaho District Court is set forth in the Record at P. 442 and is attached hereto as Appendix B.

JURISDICTION

This action was brought by appellee Newberry Company to enjoin peaceful picketing carried on by appellants in front of the Newberry Store in Pocatello, Idaho. Both the District Court and the Idaho Supreme Court held that the matter was within the jurisdiction of the state court and that Section 44-712, Idaho Code, which defined a labor dispute far more restrictively than federal statutes, was applicable to the dispute rather than federal law. Accordingly, a permanent injunction was issued enjoining the picketing.

The judgment of the Supreme Court of Idaho was entered on June 6, 1956 (R. 12), and its order denying appellants' petition for rehearing was entered on July 2, 1956 (R. 16). Notice of Appeal to this Court was filed in the Supreme Court of the State of Idaho on September 29, 1956 (R. 17).

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, U.S.C., Sec. 1257 (2). The following cases are believed to sustain the jurisdiction of this Court to review the judgment in this case by appeal; *United Automobile*

Workers v. *Wisconsin E.R.B.*, 351 U.S. 266; *United Automobile Workers* v. *O'Brien*, 339 U.S. 454; *La-Crosse Telephone Corp.* v. *Wisconsin E.R.B.*, 336 U.S. 18; *Bethlehem Steel Co.* v. *New York S.L.R.B.*, 330 U.S. 767; *Thomas* v. *Collins*, 323 U.S. 516.

STATUTE INVOLVED

The state statute whose validity is involved in this case is:

Sec. 44-712, Idaho Code:

"The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives."

QUESTIONS PRESENTED

1. Whether the Supreme Court of Idaho has disregarded and nullified in the State of Idaho the decisions of the United States Supreme Court holding that in kindred or like circumstances a state court was without jurisdiction to enjoin peaceful picketing.

2. Whether Section 44-712, Idaho Code, as applied in this case, is unconstitutional

(a) as in conflict with the National Labor Relations Act, as amended, or as invading the field which Congress has occupied by the enactment of that statute; or

(b) as in violation of the Fourteenth Amendment of the Constitution of the United States.

3. Whether the Supreme Court of Idaho erred in failing to hold that peaceful picketing to induce an

employer to enter into a contract presented a question of unfair labor practices within the exclusive jurisdiction of the National Labor Relations Board.

4. Whether the Supreme Court of Idaho erred in holding as a matter of law in Idaho that peaceful picketing and advertising to divert Appellee's patronage to unionized stores was interference with Newberry's freedom to contract.

STATEMENT OF THE CASE

The relationship between the parties began in 1952 when appellants, hereinafter referred to as the Union, filed a petition with the National Labor Relations Board seeking certification as the collective bargaining agent for employees of appellee, hereinafter referred to as Newberry. The Board assumed jurisdiction and directed an election for August 13, 1952, but immediately prior to the election, the Union withdrew its petition and the election was never held (R. 442). On August 13, 1952, the Union filed charges against Newberry before the National Labor Relations Board alleging that Newberry had committed unfair labor practices in violation of Sec. 8 (a) (1) and (5) of the National Labor Relations Act, 29 U.S.C., Sec. 158 (a) (1), (5) (R. 442).

A complaint was issued by the NLRB and a hearing was duly held before a trial examiner in Pocatello January 13, 1953. The examiner found on all issues in favor of Newberry and recommended that the complaint be dismissed (R. 420). The Board approved the findings and recommendations of the trial examiner and dismissed the complaint on March 25, 1953 (R. 420).

Thereafter, the Union began picketing Newberry, with a single picket peacefully patrolling the store front, carrying a sign which read (R. 411):

> "Members & Friends
> of Organized Labor
> We Need Your Help
> Please Shop at the Stores
> That Display This Sign
> (facsimile of Union store card or emblem)
> Our Members
> Do Not Patronize
> Newberry's
> Retail Clerks Union
> Local # 560"

At the same time Newberry was placed on the Union's unfair list (Appendix A, infra, p. 3a).

The picketing continued to and including April 8, 1953 when Newberry filed a complaint in the Idaho District Court seeking order restraining the picketing (R. 367). A show cause order was entered directing the Union to show cause why an injunction pendente lite should not be granted, and further enjoining the picketing pending the hearing (R. 373). The complaint as originally filed set forth in its paragraph V the following (R. 369):

> "* * * and for the purpose of intimidating, coercing and compelling the plaintiff to enter into an unlawful agreement with the defendant union to require its employees to join the said defendant union, did on March 31, 1953, place and post pickets immediately in front of the entrance to the premises of the plaintiff. The sole purpose of the defendant * * * is to intimidate, coerce and compel the plaintiff's employees to join and become members of the defendant union and to intimidate, coerce and compel the plaintiff to enter

> into an agreement with the defendant union whereby all of the employees of the plaintiff would be compelled to join the defendant union and to remain members thereof as a condition of employment, all of which is contrary to the laws and public policy of the State of Idaho."

At the beginning of the hearing on the show cause order, Newberry moved to amend its complaint by deleting certain portions concerning allegations that the purpose of the picketing was to require the employees of Newberry to join the Union and intimidating and coercing Newberry's employees to join and compelling them to remain members as a condition of employment (R. 412). The amended complaint, in the portions heretofore set forth as relevant, then read (R. 411-412):

> "And for the purpose of intimidating, coercing and compelling the said plaintiff to enter into an unlawful agreement with the defendant union did, on March 31, 1953, place and post pickets * * * The sole purpose of the defendants in picketing the plaintiff's place of business is to intimidate, coerce and compel the plaintiff to enter into an agreement with the defendant union all of which is contrary to the laws and public policy of the State of Idaho."

At the hearing on the show cause order, the Union argued that the state court was without jurisdiction for the reason that the matter complained of had been preempted by the Labor Management Relations Act of 1947, 29 U.S.C. Sec. 151 et seq. (R. 412). On August 31, 1953, the District Court enjoined the picketing pendente lite (R. 424), an amended answer was filed to the amended complaint, and on issues joined, trial

was held in April 1954. The crucial finding of fact was as follows (R. 472):

> "IX. That the purpose of placing said picket by the defendant union was unlawfully to intimidate, coerce and compel plaintiff to enter into an agreement with defendant union, and by the use of economic coercion by defendants, to destroy plaintiff's freedom of contracting."

This finding was upheld by the Idaho Supreme Court (Appendix A, infra, p. 9a).

The fact that Newberry was engaged in commerce was settled early in the controversy and never questioned by any of the parties or the courts involved. In the opinion of the District Court in its memorandum decision on the Order to Show Cause, the Court set forth the following (R. 414):

> "The plaintiff is engaged in the retail mercantile business operating some 480 'chain' stores located in all but a few of the states. The store involved is located in Pocatello. Substantially all—at least ninety per cent—of the merchandise offered for sale in that store comes to it from without the State of Idaho. From these facts the parties agree that regulation by Congress under the commerce clause is warranted and that the first of the two prerequisites to jurisdiction is present." (The latter reference was to prerequisites for federal jurisdiction.)

Supplementing this precise statement of the Idaho District Court was the fact that the National Labor Relations Board had already exerted its jurisdiction earlier in the controversy between Newberry and the Union (R. 386). The Idaho Supreme Court never questioned that the dispute affected commerce.

Likewise, the federal question was presented at the first stages of the controversy in the Idaho District Court and repeatedly urged throughout the state proceedings. On demurrer to the original complaint, the defendant Union challenged the jurisdiction of the state court, arguing that the matter had been preempted by Congress by its enactment of the National Labor Relations Act (R. 408). This argument was of principal concern both to the District Court and the Supreme Court of Idaho, where it was nonetheless consistently rejected.

The Idaho Supreme Court affirmed the District Court's decision on all counts. Concerning the matter of federal preemption, the Court, after a detailed statement of the facts and the proceedings below, set forth in full Sec. 2 (9) of the National Labor Relations Act as amended, 29 U.S.C. Sec. 152 (9), which defined a labor dispute as follows (Appendix A, infra, p. 7a):

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputes stand in the proximate relation of employer and employee."

Then the Idaho Supreme Court set forth that the activities of the Union were not specified in the above statutory provision and did not come within the congressional enactments covering labor practices or labor disputes affecting interstate commerce (Appendix A, infra, p. 7b). Then (Appendix A, infra, p. 7a):

> "The activities and conduct of the Union here complained of have neither been approved nor prohibited by the National Labor Relations Act, and are not within the categories covered therein. Hence the Union cannot successfully attack the jurisdiction of state courts on the ground that Newberry failed to exhaust administrative or judicial remedies available under the Labor Management Relations Act, or that the activities complained of have been preempted or covered in the anti-injunction act, 47 U.S. Stat. at Large, 70, 29 U.S.C.A. Sec. 101 to 115, or the National Labor Relations Act, 29 U.S.C.A. Sec. 151 to 168, inclusive."

The contention that the Union's activities were protected as a proper exercise of freedom of speech permitted by the First and Fourteenth Amendments to the United States Constitution was also raised at the first stage of the proceeding in the Idaho District Court (R. 408) and repeatedly urged thereafter, but was denied at all stages of the proceeding. The Idaho Supreme Court dealt with the contention in this fashion (Appendix A, infra, 9a):

> "The trial court correctly found that the picketing was for an unlawful purpose, i.e., for the purpose of unlawfully intimidating and coercing Newberry to enter into an agreement with the Union and to destroy Newberry's freedom of contracting. The constitutional provisions above cited do not prevent or prohibit the affording of appropriate remedies for the abuse of the constitutional guarantees."

The Union petitioned for rehearing thereafter, which was denied on July 2, 1956 (R. 16). Notice of Appeal was filed September 29, 1956 (R. 17).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

(a) The Evasion by the State Court of the Federal Preemption Doctrine

Notwithstanding the fact that the question of exclusive jurisdiction of the National Labor Relations Board was repeatedly urged upon the Idaho courts from the very beginning of this action, the Idaho courts erected artificial contrivances to evade the federal supremacy. The original complaint, as set forth above, alleged that the purpose of the picketing was to intimidate and coerce Newberry to enter into an unlawful agreement with the Union "to require its employees to join the said defendant union." It further alleged that the sole purpose of the defendant Union was to intimidate, coerce and compel Newberry's employees to join and become members of the defendant Union.

At the commencement of the hearing on the Order to Show Cause, Newberry moved to amend its complaint to delete references to the coercion of Newberry's employees (R. 412), thus attempting to confine the issue merely to coercion upon Newberry to enter into an "unlawful agreement" (R. 411-412). Plaintiff's counsel, in moving orally to amend the complaint in the District Court, stated that the deletions were "non-essential" in the cause (R.), that the deleted passages were "immaterial" and "unnecessary" (R.). The pleadings in this posture remained before the Idaho courts throughout. The trial court and the Idaho Supreme Court both found that the picketing was for the purpose of "intimidating and coercing Newberry to enter into an agreement with the Union" (Appendix A, infra, p. 9a).

The so called unlawful agreement, of course, was a collective bargaining agreement which would have covered the employees of Newberry.

Nonetheless, the Idaho Supreme Court chose to isolate the activities of the Union and remove them from the areas of conduct which are either prohibited or protected by the federal Act, and found they were not covered in any way by the National Labor Relations Act. The Court's chain of reasoning was set up in this fashion:

It first stated that the National Labor Relations Act was specifically limited in coverage to labor disputes which affected commerce. Then it set forth in full the federal statutory definition of labor dispute, and conveniently stated, without analysis of the language of Sec. 2 (9) of the Act, 29 U.S.C. Sec. 152 (9), that the activities of the Union were not specified in that provision and did not come within the purview of the law. This was done despite the language of Sec. 2 (9) which is so clearly applicable to the conduct of the Union, as follows:

> "The term 'labor dispute' includes any controversy concerning . . . the representation of persons in . . . seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

Thus followed the Idaho Supreme Court's conclusion: "The activities and conduct of the Union here complained of have neither been approved nor prohibited by the National Labor Relations Act, and are not within the categories covered therein" (Appendix A, infra, p. 7a). This permitted the Idaho Court

to apply its own statute on definition of a labor dispute, Idaho Code, Sec. 44-712, which contains a far more restrictive definition of the term than the federal law, and under the state law find no labor dispute and thus freedom to issue the injunction.[1]

It is respectfully submitted that the Idaho courts openly and summarily flouted the federal preemption doctrines repeatedly established by the Supreme Court of the United States.[2] Attorneys for the Union argued

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[1] Appellant believes the Idaho Supreme Court misunderstood the federal supremacy argument (Appendix A, infra, p. 8a). As an example, the court stated in reference to this argument, "Further, the Union had already had a hearing before the National Labor Relations Board and on issues presented, the Board determined the controversy favorable to Newberry." The court obviously referred to a previous hearing before the National Labor Relations Board growing out of charges of a refusal to bargain brought against the company by the Union (Appendix A, infra, p. 1a). This hearing in no way dealt with, encompassed, or referred in any manner to the issues before the Idaho Supreme Court, particularly since no picketing had commenced. The employer's alleged misconduct in refusing to bargain was the sole issue. Indeed, at no time were the matters alleged by the employer in its complaints in the state court brought to the attention of the Labor Board although they were clearly within the Board's jurisdiction inasmuch as they charged unfair labor practices on the part of the Union. The employer sought its injunctional remedy from the state court. The Idaho Supreme Court failed to differentiate between charges of unfair labor practices which may be brought against an employer, and those which may be brought against a union. One does not embrace the other. Plainly the Board was never given an opportunity to consider the unfair labor practices alleged in the complaints filed in the state court.

[2] At another place in its opinion, the Idaho Supreme Court embraced a doctrine already specifically repudiated by this Court, wherein it stated: "Further, if the Congressional enactments covering labor disputes were applicable, such remedies would have been futile. Before the machinery could have been put in opera-

Weber v. *Anheuser-Busch, Inc.*, 348 U.S. 468, before the Idaho Supreme Court in their brief in oral argument, and in their petition for rehearing, as well as numerous other recent rulings of this Court on the lines to be drawn between federal and state authority. But the Idaho Supreme Court ignored this stricture from *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468:

> "But where the moving party itself alleges unfair labor practices where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the State Court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

The complaint, by alleging a purpose of the Union to coerce Newberry into entering into a contract with the Union, whether the so called "non-essential" allegations of coercing the employees to join the Union were left in or not, raised an issue of whether the Union was in violation of Sec. 8 (b) (1) (A) or Sec. 8 (b) (2) of the National Labor Relations Act. The findings of fact by the District Court, which were approved by the Idaho Supreme Court, supported the allegations of the complaint that the purpose of the Union was to coerce Newberry into contracting with the Union. The state courts should have declined jurisdiction from the outset.

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tion the wrong complained of and prohibited by the injunction would have been accomplished." (Appendix A, infra, p. 8a).

The futility of federal remedy argument was rejected by this Court in *Building Trades Council* v. *Kinard Construction Co.*, 346 U.S. 933.

A further unfortunate example of the Idaho Court's unwillingness to follow the prevailing federal preemption doctrines is illustrated by *Pocatello Building & Construction Trades Council* v. *C. H. Elle Construction Co.*, No. 372, 1956 Term, where this Court reversed the Idaho Supreme Court in a per curiam ruling on Monday, November 5, 1956.[3] In that case, like this one, the allegations of the complaint and the facts of the case clearly established federal jurisdiction, but the Idaho court ignored this doctrine with hardly any comment (Jurisdictional Statement of Appellants, Appendix A, page 27, *Pocatello Building & Construction Trades Council* v. *C. H. Elle Construction Co.*, No. 372, 1956 Term.)

But here the Idaho Supreme Court has at least attempted to justify its ruling by its statement that the activities of the Union were never prohibited or protected under the National Labor Relations Act. A similar attempt to evade the federal preemption doctrine was answered decisively by this Court in *Teamsters Local* v. *New York, N.H.&H. R.R. Co.*, — U.S. —, 76 S. Ct. 227, where Mr. Justice Minton, for a unanimous court, said:

> "Respondent contends, however, that even if railroads may seek the aid of the N.L.R.B., it was not required to do so in this case because petitioners' conduct was neither protected by paragraph 7 nor prohibited by paragraph 8 (b) (4) of

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[3] In the opinion below, the Idaho Supreme Court cited this ruling, *Elle* v. *Pocatello Building & Construction Trades Council*, and *Simplot* v. *Pocatello Bldg. & Constr. Trades Council*, 297 P. 2d 519, as additional authority for its position taken in this case, and further relied on the same line of cases in this proceeding that were relied on to establish state jurisdiction in the *Elle* decision (Appendix A, infra, pp. 8a, 9a).

> the Labor Management Relations Act. As we noted earlier, respondent's amended complaint alleged violation of the Act. Whether the Act was violated or whether, as respondent now claims, it was not, is of course, a question for the Board to determine. Even if petitioners' conduct is not prohibited by paragraph 8 of the Act, it may come within the protection of paragraph 7, in which event the State was not free to enjoin the conduct. In any event the Board's jurisdiction in the circumstances of this case is clearly settled by this court's recent decision in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 481."

The attempt of the Idaho Supreme Court to evade the federal supremacy doctrine is thus without foundation on every count. The allegations of the complaint and the facts of this case bring it squarely within the holding of the *Weber* case and it was error for the Idaho Court to decline to follow this Court's clear doctrines.

(b) That the Allegations of the Complaint Establish Federal Jurisdiction Is Supported by Consistent Authority

The facts in *Garner* v. *Teamsters Union*, 346 U.S. 485, are similar enough to those in the instant case to have persuaded the Idaho court it lacked jurisdiction. In *Garner*, the union was picketing the employer seeking to organize his employees. The union there did not represent a majority of Garner's employees just as the Union here did not represent the Newberry employees. In the instant case, the Union was picketing to compel Newberry to enter into a contract, according to the Idaho Supreme Court, which of necessity would have entailed organization of the Newberry employees into the Union. The words of the late Mr.

Justice Jackson in *Garner* are just as applicable to this case as if they were written for it:

> "Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute it has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioner presented it to that body. The power and duty of primary decision lies with the Board, not with us." 346 U.S. 485, .

In *Building Trades Council* v. *Kinard Construction Co.*, 346 U.S. 933, the unions involved were peacefully picketing the employer's construction project for the purpose of requiring the employer to cause his employers to join the union, according to the Alabama Supreme Court, 258 Ala. 500. A state injunction was issued, holding that the union conduct was violative of Sec. 8 (b) (1) (A) of the National Labor Relations Act, and this Court reversed per curiam.

Other state courts have had little difficulty in finding that union conduct similar to that involved herein falls within the exclusive jurisdiction of the National Labor Relations Board. The Supreme Court of Kansas rejected the identical theory advanced by the Idaho Court herein in *City Motors, Inc.*, v. *Machinists Lodge* 778, — Kan. — (1956), 292 P. 2d 1102, when it stated:

> "The essence of the first contention advanced by appellant as a ground for reversal of the trial court's judgment is that stranger picketing by a union, which has not been selected as the bargain-

> ing agent for employees, is not within the intent or purview of the Labor Management Relations Act of 1947, hence the state court, not the National Labor Relations Board, has jurisdiction over activities such as are here involved. In view of recent decisions this contention lacks merit and requires little comment. All that need be said with respect thereto is that this court, . . . as well as others, see e.g. Garner v. Teamsters, 346 U.S. 485, have held to the contrary."

The Supreme Court of Washington took the same position in *Stoddard-Wendle Motor Co.* v. *Machinists Lodge 942,* — Wash. — (1956), 295 P. 2d 305, in a case where the union did not represent any employees of the employer, was peacefully picketing the premises, and had placed the employer on the unfair list. This union conduct was identical to that of petitioner herein. The Washington court said:

> "In spite of the analysis and conjectures which have been made, and the criticisms which have been directed to the language of the Garner opinion, we conclude that the United States Supreme Court has announced the following rule:
>
> "A state court does not have jurisdiction to enjoin peaceful picketing to induce unionization of the employees of an interstate employer, since such activity presents the question of an unfair labor practice within the meaning of the terms of the Labor Management Relations Act, which initially at least, gives the National Labor Relations Board exclusive jurisdiction."

See also *Busch & Sons, Inc.* v. *Retail Union,* — N.J. —, 104 A. 2d 488; *Gulf Shipside Storage Corp.* v. *Moore,* — La. —, 71 So. 2d 236; *Dyer* v. *IBT,* — Cal. App. —, 269 P. 2d 199; *Grimes & Hauer, Inc.* v. *Pol-*

lock, 163 Ohio St. 372, 127 N.E. 2d 203; *Cooper Transport Co.* v. *Stufflebean,* — Mo. —, 280 S.W. 2d 832.

Thus the Idaho Supreme Court has held contrary to every recent leading judicial authority on similar questions. Its decision is especially in conflict with the rulings of the highest state courts of Kansas, Washington, New Jersey, Louisiana, Ohio, and Missouri, as set forth by the cases above listed. There is no other highest state court decision on similar facts supporting the Idaho ruling since this Court's decision in *Garner* v. *Teamsters, supra.* With all due deference, the Idaho Supreme Court has simply refused to accept the settled rulings on questions of this kind, and only a reversal of its ruling by this Court will cause it to conform to the law of the land.

(c) The Idaho Court's Holding That Peaceful Picketing and Advertising to Divert Newberry's Patronage Was an Interference With Newberry's Freedom to Contract is a Serious Limitation on the Union's Right of Free Speech

The freedom of speech question that is often present in picketing cases is of particular importance here. The Idaho Supreme Court held that the Union's peaceful picketing of Newberry's premises was for an unlawful purpose, i.e., to interfere with Newberry's freedom to contract. Yet, the District Court specifically found, and such finding was approved by the Idaho Supreme Court (Appendix A, infra, p. 9a), in its finding numbered "VII," as follows: "That at no time did the defendant union, or any of its representatives or agents, present to or discuss with plaintiff, a contract or proposed agreement."

In this case, there was nothing more than one single picket peacefully patrolling in front of Newberry's

premises with a sign asking union members and the public to decline to patronize the store. There is not even a suggestion that there was anything more to the picketing in any way whatsoever. Yet the Idaho courts found that this purest kind of peaceful picketing-advertising was for an unlawful purpose because by the very nature of it, it would intimidate and coerce Newberry into making a contract with the Union, despite the fact as found by the Idaho courts, that no contract was ever presented, discussed, or proposed by the Union!

There can be no more clearly cut factual situation coming within the ruling of this Court in *American Federation of Labor* v. *Swing*, 312 U.S. 321, than this case presents. The words of this Court in *Swing* are particularly appropriate here, at 312 U.S. 321, 326:

> "We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.
>
> "Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of eco-

> nomic competition between employer and workers so small as to contain only an employer and those directly employed by him."

This Court's rulings in *Hughes* v. *Superior Court*, 339 U.S. 460; *Building Service Employes* v. *Gazzam*, 339 U.S. 532; *International Brotherhood of Teamsters* v. *Hanke*, 339 U.S. 470; *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, and others, are readily distinguishable on their facts from the instant matter. In all those cases, there was affirmative union conduct accompanying picketing sufficient to establish an unlawful purpose to restrain and coerce the employees or the parties being picketed. While the Idaho court found the purpose of picketing here unlawful, there are no facts to support a finding of an unlawful purpose other than the mere picketing by a union that did not represent the employer's employees urging members and friends of organized labor to shop at stores displaying the union store card, and not to patronize Newberry's. This is precisely within the *Swing* holding that "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employer and workers so small as to contain only an employer and those directly employed by him."[4]

Now, either *Swing* should be followed, or it should be overruled. It is submitted that the holding in *Swing* is still the basic law of the land, the facts of

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[4] In this connection, the Idaho statute, Sec. 44-712, defining a labor dispute as a controversy between an employer and a majority of his employees in a bargaining unit is in violation of the Fourteenth Amendment by restricting the area of picketing in direct contravention to the holding in *Swing, supra.*

this case are squarely within that holding, and Idaho ought to be compelled to follow it. The decision of the Idaho Supreme Court was a serious restriction on the Union's right of free speech.

WHEREFORE, for the reasons hereinabove set forth, the federal questions presented are substantial and this Court should assume jurisdiction and reverse the decision of the Idaho Supreme Court.

Respectfully submitted,

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